

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GIRMIA DESBELE ZEROM a/k/a GIRMAI
DESBELE ZEROM,

Defendant-Appellant.

UNPUBLISHED

October 16, 2003

No. 241440

Muskegon Circuit Court

LC No. 01-046451-FC

Before: Griffin, P.J., and Neff and Murray, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions of armed robbery, MCL 750.529, assault with intent to do great bodily harm less than murder (AGBH), MCL 750.84, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to concurrent terms of 13½ to 30 years for the armed robbery conviction and four to ten years for the AGBH conviction, and a consecutive two-year term for the felony-firearm conviction. We affirm.

I

This case stems from the armed robbery of a wheel-chair-bound, eighty-nine-year-old Muskegon man in his home on August 27, 2001. The robbery was allegedly planned and undertaken in concert by defendant and three relatives of the victim, including his great-grandson, Anthony Puente, Anthony's wife, Mindy Puente, and Anthony's sister, Rachel Puente. According to testimony at trial, Anthony, who had access to the victim's home to perform chores, pretended to be a victim of the robbery by the others, who confronted the elderly man at gunpoint, knocked him unconscious with a shovel, and then ransacked the house, stealing money, jewelry, a gun, and other miscellaneous items. The Puentes implicated defendant as a principal in the robbery, indicating that he held the victim at gunpoint, threatened him, and physically assaulted him by kicking him and hitting him in the head with a shovel. Defendant denied being involved in the commission of the robbery, testifying that he participated only in the division and sale of the property, which he claimed he did not know was stolen.

II

Defendant first argues that there was insufficient evidence to sustain his convictions. Defendant's argument is premised on his contention that the testimony of Anthony, Mindy, and Rachel Puente must be discredited because it was so inherently implausible that it could not be believed by a reasonable juror, and because the testimony was seriously impeached and the case was marked by uncertainties and discrepancies. *People v Lemmon*, 456 Mich 625, 643-644; 576 NW2d 129 (1998). Defendant contends that if the tainted testimony is disregarded, the case against him cannot be sustained. We disagree.

This Court reviews de novo a claim of insufficient evidence. *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002). We review the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could have found that each element of the crime was proved beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999).

Defendant asserts that the Puentes' trial testimony was inconsistent with statements given to the police shortly after their arrest and with their preliminary examination testimony. As defendant notes, many discrepancies in the witnesses' trial testimony were brought out by the prosecutor on direct examination. The witnesses admitted that some previous statements they made were untruthful. Anthony admitted that he initially lied by denying that the Puentes were even involved in the robbery, to protect Mindy and Rachel. He subsequently stated that Rachel was involved, but again lied by falsely naming others as the perpetrators, to protect himself and Mindy. Mindy admittedly lied by denying that she, Rachel, and defendant were involved in a previous attempt to steal from the victim's home, but she indicated that she was simply mistaken about a couple other details that were inconsistent with her trial testimony. Rachel admitted that the first time she told the police about the previous visit to the victim's home to steal was on the morning of her testimony. She also admitted that she lied about Anthony's role in the robbery and lied when she previously told the police that she did not see defendant hit the victim because she, in fact, saw defendant hit the victim one time.

Defendant had the opportunity to fully cross-examine the witnesses with regard to these inconsistent or untruthful statements. And despite the inconsistencies, there was other evidence to corroborate key aspects of the witnesses' trial testimony, including that regarding defendant's involvement. The testimony concerning defendant's assault of the victim, threatening to kill him at gunpoint and kicking him and hitting him in the head with a shovel, was sufficient to support the AGBH conviction. *People v Lugo*, 214 Mich App 699, 710-711, 542 NW2d 921 (1995). Contrary to defendant's claim, we cannot conclude that the witnesses' credibility was so seriously undermined that it was deprived of all probative value or that the jury could not have believed it. *Lemmon*, *supra* at 643.

Defendant has not established an exception to the general rule that matters of witness credibility are for the jury to resolve. *Id.* at 642; *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 478, amended 441 Mich 1201 (1992). Defendant has failed to show that there was insufficient evidence to support his convictions.

III

Defendant argues that the trial court erred in allowing Barbara Puente, Anthony's mother, to testify regarding statements made by Anthony, when Anthony returned to the Puente home after the robbery, which implicated defendant as a coconspirator. We disagree. A preserved nonconstitutional allegation of error is not ground for reversal unless a defendant demonstrates that, after an examination of the entire cause, it affirmatively appears that it is more probable than not that the error was outcome determinative. *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999).

MRE 801(d)(2)(E) excludes from the definition of hearsay "a statement by a coconspirator of a party during the course and in furtherance of the conspiracy on independent proof of the conspiracy." Defendant argues that Anthony's statements were inadmissible because they were not made during the course and in furtherance of the conspiracy. *People v Bushard*, 444 Mich 384, 394; 508 NW2d 745 (1993) (Boyle, J., joined by Griffin, J.).

Defendant argues that the statements were made long after the robbery was over and therefore were not made in the course of the conspiracy. "To satisfy the 'during the course' aspect of the exception, the conspiracy must be extant at the time the statement is made." *Id.* at 394. In this case, the statements were made before defendant, Mindy, and Rachel returned to the Puente home with the stolen property, which was thereafter divided and distributed, with later efforts by those involved to sell the items. We find no clear error in the court's conclusion that the conspiracy was extant at the time of Anthony's statements to Barbara, given that one of the main objectives of the conspiracy was to steal the property to obtain money. *Id.* at 394-396. "[E]ven after the primary object of the substantive crime is complete, the conspiracy may continue if its objectives contemplated the completion of financial or other arrangements." *Id.* at 394.

Defendant contends that Anthony's statements were not in furtherance of the conspiracy because they tended to exculpate Anthony and minimize his role in the robbery. Further, they were not self-incriminating, but rather shifted blame to defendant. The "in furtherance" requirement has been construed broadly. *Id.* at 395. To be made in furtherance of a conspiracy, the statement must be such as to prompt the listener, who need not be a coconspirator, to respond in a way that promotes or facilitates the carrying out of a criminal activity. *Id.*

We find no clear error in the trial court's finding that Anthony's statements were uttered in furtherance of the conspiracy. *Id.* at 396. The court concluded that the coconspirators were still acting to further the conspiracy because defendant and the women had not yet returned with the goods, which were yet to be distributed. We view these facts relevant more to the question whether the conspiracy was extant at the time of the statements rather than whether they were in furtherance of the conspiracy. Nonetheless, this requirement is construed broadly, and the statements could be viewed as an attempt to prevent Barbara from reacting to the robbery by reassuring her that her grandfather was not seriously injured, thereby invoking her silence with regard to the involvement of her children and defendant, e.g., conducting no investigation or making no report to authorities. Thus, the statements promoted or facilitated the carrying out of the criminal activities. Even were we to find error in the admission of the challenged statements, we would find no basis for reversal because the alleged error cannot be said to be outcome determinative. *Lukity, supra* at 496.

IV

Defendant claims that the prosecutor's misconduct denied him his right to a fair trial and requires reversal of his convictions. We disagree.

The test for prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Rodriguez*, 251 Mich App 10, 29-30; 650 NW2d 96 (2002). Appellate review of alleged prosecutorial misconduct is precluded unless a defendant specifically and timely objects. *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000). Absent an objection, we will review the defendant's claim only for plain error. *Id.*

Prosecutorial comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial. *Rodriguez*, *supra* at 30. The propriety of a prosecutor's remarks depends on all the facts of the case. *Id.* While prosecutors may properly argue the evidence and all reasonable inferences, they may not make a statement of fact that is unsupported by the evidence in the case. *Schutte*, *supra* at 721.

Defendant cites a litany of alleged instances of prosecutorial misconduct committed in closing argument, claiming that the prosecutor improperly vouched for the credibility of his witnesses; bolstered the validity of his case; denigrated defendant, his defense, and defense witnesses; argued facts not in evidence; mischaracterized the evidence; and argued civic duty and sympathy for the victim as a basis to convict. Defendant failed to specifically and timely object to the alleged misconduct, and we find no plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

The prosecutor did not misrepresent the evidence by suggesting that the Puentes' testimony was not the most critical in identifying defendant as the perpetrator. Rather, the prosecutor asked the jury to consider the Puentes' testimony along with all the other evidence. Nor did the prosecutor improperly vouch for his witnesses by glossing over "fatal flaws" in their testimony. To the contrary, the prosecutor repeatedly referenced shortcomings in some of his witnesses and their testimony, and urged the jury to evaluate the testimony in light of the physical evidence and use certain testimony with caution.

The prosecutor did not improperly appeal to the sympathy of the jury by referring to the victim as old and feeble and the facts of the case as "ugly." The prosecutor urged the jury to decide the facts of this case, not using sympathy, but using common sense, everyday reasoning, and all of the evidence as a whole. Further, as plaintiff points out, the facts in evidence were that defendant struck the victim, an eighty-nine-year-old man, who was blind in one eye, had one leg amputated, and was wheelchair-bound.

Defendant suggests that the prosecutor improperly used a version of a civic duty argument, appealing to the fears and prejudices of the jury, to elicit empathy for his office and the dirty work necessary to present this case to the jury. We decline to address this claim of error because defendant fails to cite authority for his contentions or properly argue their merits. *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998); *People v Jones (On Rehearing)*, 201 Mich App 449, 456-457; 506 NW2d 542 (1993).

Defendant complains that in rebuttal argument, the prosecutor repeatedly referred to defendant as a liar, vouched for his witnesses, and denigrated the defense. The prosecutor's references to defendant's credibility did not constitute improper vouching for the prosecution's case. A prosecutor may argue from the facts that the defendant or another witness is not worthy of belief, and need not state inferences and conclusions in the blandest terms. *People v Launsbury*, 217 Mich App 358, 361; 551 NW2d 460 (1996). Defendant cites to no remarks that constitute improper personal attacks on the credibility of defense counsel. *People v Kennebrew*, 220 Mich App 601, 607; 560 NW2d 354 (1996). Although the remark about Detective Riley's testimony and whether he would risk his thirty-year career as a police officer to lie may be objectionable, the prosecutor did not imply that he had some special knowledge of the witness' truthfulness. *People v Bahoda*, 448 Mich 261, 276-277; 531 NW2d 659 (1995). Nor did the prosecutor ask the jury to convict on the basis of the prestige of his office. *People v Fuqua*, 146 Mich App 250, 254; 379 NW2d 442 (1985), overruled on other grounds in *People v Gray*, 466 Mich 44; 642 NW2d 660 (2002). Finally, we find no error requiring reversal in defendant's claim that the prosecutor shifted the burden of proof, suggesting some obligation on the part of defendant to produce evidence.

The prosecutor's closing argument was not improper given the evidence and the circumstances of the case. Moreover, defendant has failed to carry his burden of showing plain error that affected his substantial rights. *Schutte, supra* at 720.

Affirmed.

/s/ Richard Allen Griffin
/s/ Janet T. Neff
/s/ Christopher M. Murray